

NTSB Order No.  
EM-129

UNITED STATES OF AMERICA  
NATIONAL TRANSPORTATION SAFETY BOARD  
WASHINGTON, D. C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD  
at its office in Washington, D. C.  
on the 26th day of March, 1986

JAMES S. GRACEY, Commandant, United States Coast Guard

v.

MICHAEL CALICCHIO, Appellant.

Docket ME-113

OPINION AND ORDER

Appellant challenges a February 8, 1985 decision of the Vice Commandant (Appeal No. 2378) affirming a six month suspension (to be remitted on 12 months' probation) of his merchant mariner's license (No. 512892) as ordered by Coast Guard Administrative Law Judge Francis X. J. Coughlin on October 25, 1983 following an evidentiary hearing completed on September 26, 1983.<sup>1</sup> The law judge had sustained a charge of negligence based on a specification alleging that the appellant, while serving as Master aboard the tankship POLING BROS. NO. 7 on July 21, 1983 during an outbound transit of the CNJ Railroad Bridge in Newark Bay, New Jersey, had failed to navigate his vessel "with due caution resulting in a collision" with an anchored drill barge. On appeal to the Board, the appellant contends, among other things, that the evidence in the record does not support a finding of negligence under the specification found proved.<sup>2</sup> For the reasons discussed below, we agree.

At the time of the collision, which produced no injuries and only minor damages, the east draw of the bay was closed to marine traffic so that drilling and blasting operations to remove some piers and other structures that had been part of the long defunct CNJ railroad bridge could be conducted. Concurrent with the closure of the east draw and the creation of a safety zone there,

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<sup>1</sup>Copies of the decisions of the Vice Commandant (acting by delegation and the law judge are attached.

<sup>2</sup>The Coast Guard has filed a reply brief opposing the appeal.

the west draw, which had been closed for similar demolition work on that side of the bay, was reopened and buoys marking the eastern boundary of the channel in the west draw had been placed in position. The collision between appellant's vessel and the drill barge occurred following an attempt by a tug attending the barge to signal appellant to alter his course to use the west draw rather than the east draw. The tug sought to accomplish this by proceeding into the otherwise clear waterway of the east draw between the drill barge and an abutement to its west. To avoid hitting the tug which was blocking his path appellant tried to stop his vessel by reversing both engines, a maneuver that produced a sheer of the tankship to the right which appellant was unable to check effectively in the space available to him. Thus, although the tug subsequently did move out of the tankship's path, appellant could not keep the tankship, at it proceeded through the draw, from sideswiping the drill barge. Appellant maintains here, as he did before the law judge and the Vice Commandant, that the collision was not caused by negligence on his part but resulted from the movements of the tug which embarrassed his safe navigation of the tankship.

For reasons that need not be recounted in this decision, the law judge concluded that appellant prior to the subject transit of the bridge had neither actual nor constructive notice of the opening of the west draw or of the closing of the east draw. In fact, based on that conclusion the law judge dismissed, on appellant's motion, a specification alleging that appellant had been guilty of misconduct for wrongfully entering a safety zone. Moreover, the law judge dismissed, on the Coast Guard's motion, a specification alleging that appellant had been negligent in "fail[ing] to maintain [his] vessel within the limits of the buoyed channel" in the west draw. Notwithstanding these dismissals, the law judge sustained the specification that appellant's collision with the drill rig resulted from his failure to navigate his vessel "with due caution" because, according to the law judge, appellant "was in an area where he had no right to be... [since] he was outside of the clearly marked navigational channel of Newark Bay at CNJ Bridge" (Decision and Order at page 13).

On appeal to the Vice Commandant the appellant pointed out that the law judge had found him guilty of negligence on the basis of a specification he previously had dismissed. Instead of discussing this assignment of error, however, Vice Commandant in effect asserts that appellant could properly be found to have been negligent, whether or not he was excusably ignorant of the safety zone or entitled as matter of law to transit the birdge outside of the marked channel, if his judgment in entering the east draw contrary to that of a reasonably prudent pilot acting in the same

circumstances.<sup>4</sup> We do not concur in the Vice Commandant's statement of the issue in the proceeding.<sup>5</sup>

Unlike the specifications dismissed by the law judge, the specification supporting the charge of negligence he sustained did not place in issue the propriety or reasonableness of appellant's judgment in determining to transit the CNJ Bridge via the east draw. Rather, that specification only drew in question the degree of care exercised by appellant in his navigation of the POLING BORS. No. 7, "while transiting outbound the CNJ Railroad Bridge," in light of his vessel's collision with the drill barge. To prove that the appellant had not exercised the appropriate degree of care (i.e., "due caution") during the transit it was incumbent on the Coast Guard to show that the collision was brought about by appellant's mishandling or mismanagement of the tankship's navigation through the draw, a showing unrelated to the wisdom or validity of his route selection, which, by virtue of the dismissed specifications, was no longer part of the case. The Coast Guard presented no such evidence.<sup>6</sup> It follows that the Vice Commandant's affirmance of the suspension order cannot stand.

ACCORDINGLY, IT IS ORDERED THAT:

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<sup>4</sup> Negligence is defined in 46 CFR 5.05-20(a)(2) as "the commission of an act which a reasonably prudent person of the same station, under the same circumstances, would not commit, or the failure to perform an act which a reasonably prudent person of the same station, under the same circumstances, would not fail to perform."

<sup>5</sup>Moreover, apart from the fact that the Vice Commandant's statement of the issue creates a theory of liability neither set forth in nor contemplated by the specification found proved by the law judge, the Coast Guard put on no evidence that a reasonably prudent pilot, with or without an available alternative course, would not have entered the draw due to the presence of demolition vessels there.

<sup>6</sup>The evidence in the record does establish, however, that appellant sought by radio a passing agreement with the vessels in the east draw and, although the tape of transmissions does not show a clear response to his broadcasts, that he believed he had received an acknowledgement of a two whistle passing. While there is some indication in the record that the drill barge and the tug attending it could not transmit on their radio because the barge had explosives aboard, it appears that neither of those vessels had their radios turned on at the time of this incident.

1. The appellant's appeal is granted, and
2. The order suspending appellant's marine license is reversed.

BURNETT, Chairman, GOLDMAN, Vice Chairman and LAUBER, Member of the Board, concurred in the above opinion and order.